Filed 3/14/19 P. v. Quamme CA5
Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA QUAMME, Defendant and Appellant.	F075753 (Super. Ct. No. BF166710A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jeffrey D. Firestone, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

[*] Before Detjen, Acting P.J., Franson, J. and Meehan, J.

A jury convicted appellant Joshua Quamme of residential burglary (Pen. Code, §§ 459, 460, subd. (a))[1] and found true an allegation that someone other than an accomplice was present during the burglary (§ 667.5, subd. (c)(21)). In a separate proceeding, the court found true a serious felony enhancement (§ 667, subd. (a)) and allegations that Quamme had a prior conviction within the meaning of the "Three Strikes" law (§ 667, subds. (b)-(i)).

On April 27, 2017, the trial court sentenced Quamme to an aggregate 13-year prison term, a doubled middle term of eight years and a five-year serious felony enhancement.

On appeal, Quamme contends: (1) the court prejudicially erred by its failure to instruct on a lesser related offense; and (2) the matter should be remanded for the trial court to exercise its discretion pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393) to determine whether to strike his serious felony enhancement.[2] We find merit to this latter contention, vacate the sentence, and remand to the trial court for further proceedings. In all other respects, we affirm.

---

[1] All statutory references are to the Penal Code.

[2] On October 30, 2017, Quamme filed a brief raising only the instructional error issue.

On August 28, 2018, in an unpublished opinion, we rejected this contention and affirmed the judgment. (*People v. Quamme* (Aug. 28, 2018, F075753) [nonpub. opn.].)

On October 9, 2018, Quamme filed a petition for review with the Supreme Court.

On November 14, 2018, the Supreme Court granted Quamme's petition and transferred the matter to this court with directions to vacate our decision and reconsider the cause in light of Senate Bill 1393, which allows the trial court to strike serious felony enhancements. In supplemental briefing, the parties agree that Senate Bill 1393 applies retroactively to Quamme's appeal and the matter should be remanded so the trial court can exercise its discretion to decide whether to strike Quamme's serious felony enhancement.

FACTS

The Prosecution Case

Edith Goze testified that on December 28, 2016, at approximately 8:15 a.m., she was at her house in Kern County when her dogs began barking. Goze answered a knock on the door and found Quamme, whom she did not know, standing outside. Quamme asked if Juan lived there and Goze replied that no one by that name did. Quamme continued talking to her for another minute during which she reiterated that no one named Juan lived there before she closed the door and locked it.

After Goze went to the den and sat down, one of her dogs began growling. Goze returned to the front door, opened it, and saw her husband's adult tricycle in the driveway.[3] Goze ran through the house and told her son, Nathaniel, that Quamme was still there. Nathaniel told Goze to call 911 as he walked outside.

Nathaniel testified he was sleeping in his bedroom, which shares a wall with the garage, when he was awakened by a knock at the front door and the dogs barking. After he heard his mother speak to a man and shut the door, Nathaniel heard noises that sounded like someone walking in and out of the garage dragging a cardboard box. When his mother told him the man was still there, Nathaniel got up, walked outside through the front door and saw the green door to the garage open[4] and his father's tricycle outside the garage. He also saw items stacked on top of a freezer in the garage near the green door and in the doorway. Although Nathaniel did not yet see anyone in the garage, he heard someone moving things and rummaging through his father's tools.[5]

---

[3] The tricycle had not been there when she spoke with Quamme.

[4] However, a large white door through which cars enter the garage was closed.

[5] Earlier that morning, between 2:00 a.m. and 2:30 a.m., when Nathaniel went into the garage, he did not see anything out of place and his father's tricycle was in the garage.

Nathaniel called the police and went to retrieve a handgun. Nathaniel then walked into the garage and pointed the gun at Quamme, who was kneeling as he looked through some tools. Quamme looked up and said, "Oh shit. Oh shit. I'm sorry. I'm sorry." Nathaniel asked him what he was doing there and Quamme responded that he was looking for Juan. Quamme began talking to Nathaniel as he walked toward him, causing Nathaniel to walk backwards. When Quamme had backed Nathaniel out of the garage, Kern County Sheriff's Deputy Scott Wall arrived and took Quamme into custody. Nathaniel then noticed that next to the freezer, someone had placed trash bags containing items that had been in the back of the garage. Wall searched Quamme and found a soft sunglasses pouch that belonged to Nathaniel's father.

Wall testified that he believed Quamme was too intoxicated to care for his own safety and that when questioned, Quamme had difficulty focusing on the questions. The bag found on Quamme contained $9.85 in coins.

Richard Smith testified that in 2008, while a police detective for Ridgecrest, he investigated a residential burglary that occurred sometime between November 1, 2008, and November 4, 2008. During an interview with Quamme, he stated he had gone to the burglarized house to see if a man named Joe was home. Upon finding out he was not there, Quamme went into the garage and took an electric guitar. The parties stipulated that on November 20, 2008, Quamme pled no contest to first degree residential burglary.

The Defense Case

Quamme testified that in the days prior to entering the garage he had been using methamphetamine and heroin daily and the day before, he used methadone and afterwards injected heroin. The night he entered the garage he thought people on bicycles were chasing him. Although he was not sure if the people were real or hallucinations, he walked up the Gozes' driveway to hide behind two parked cars and saw the garage door open. Quamme entered the garage to relax and calm down. His friend Juan eventually showed up and told him to go ahead and stay there, and that Juan

would try to get him a ride in the morning. While in the garage, Quamme rummaged through things. Once he noticed the sun had come up, he walked to the front door and knocked because he was looking for Juan. After speaking with a woman, he went back in the garage and was getting ready to leave when her son confronted him. Quamme denied that he intended to steal anything.

DISCUSSION

Prior to instructing the jury, the court asked the parties if there was a request for instructions on any lesser included offenses. Defense counsel requested an instruction on trespass and the prosecutor stated that he did not object. The court, however, denied the request because trespass is not a lesser included offense of burglary. Quamme contends that based on the evidence, the jury could have found he did not have the requisite intent to commit burglary and that he committed only a trespass, a lesser related offense of burglary. Thus, according to Quamme, the court erred by its failure to instruct on trespass. Quamme further contends that because the failure to instruct on trespass deprived the jury of the opportunity to find him guilty of the lesser offense of trespass, it is reasonably probable he would have received a more favorable result if the instruction had been given. There is no merit to these contentions.

" 'It is the "court's duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed." [Citation.]' [Citations.] As we recently reiterated, however, trespass is a lesser *related* offense, not a lesser *included* offense, of burglary. [Citations.] '[T]here is no federal constitutional right of a defendant to compel the giving of lesser-related-offense instructions. [Citation.]' [Citation.] Regardless of defendant's legal and factual theories concerning how his conduct may have constituted trespass, that potential crime nonetheless remains at most a lesser offense related to (but not included in) the offense of burglary." (*People v. Foster* (2010) 50 Cal.4th 1301, 1343-1344.) "As there is no requirement that the trial court give

an uncharged lesser related offense instruction even if the defendant and prosecutor agree to have it given, [a] trial court's refusal to give the instruction [does] not constitute error." (*People v. Hall* (2011) 200 Cal.App.4th 778, 783.) Thus, even though the prosecutor did not object to the court instructing the jury on trespass, the court did not err by its failure to instruct the jury on that offense.

In any event, the failure to give the instruction was harmless. "[T]he trial court's failure to instruct on *necessarily included* offenses is reviewed for prejudice under the *Watson*[6] standard." (*People v. Hicks* (2017) 4 Cal.5th 203, 215 (*Hicks*).) It follows that the failure to instruct on a lesser related offense, if such were error, should likewise be reviewed for prejudice under the *Watson* standard. (Cf. *Hicks*, at p. 215.) "Accordingly, in evaluating prejudice, the relevant inquiry is whether it is 'reasonably probable' defendant would have obtained a more favorable result had the trial court given the instruction [at issue here]." (*Ibid.*)

In order to convict Quamme of first degree burglary, the prosecutor had to prove the following elements: "(1) entry into a structure currently being used for dwelling purposes and (2) with the intent to commit a theft or a felony." (*People v. Sample* (2011) 200 Cal.App.4th 1253, 1261.)

The only issue here was whether Quamme had the requisite intent when he entered the Gozes' garage. Quamme had rummaged through many of the items in the garage and was still doing so when Nathaniel first saw him there. He also removed an adult tricycle from the garage, filled two trash bags with items from the garage and placed them next to a freezer located in there, and stacked other items on the freezer and in the garage's doorway. During a postarrest search of Quamme, Wall found a sunglasses pouch, containing $9.85 in coins, that belonged to Nathaniel's father. Further, the prosecutor

---

6 *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

presented evidence that in 2008 Quamme burglarized a friend's garage and stole an electric guitar and he was impeached with his felony conviction that was based on that incident. Thus, the record contains compelling evidence that supports the jury's finding that he entered the garage with the intent to steal. Moreover, because of the strength of the evidence that Quamme entered the garage with larcenous intent, it is not reasonably probable the jury would not have convicted Quamme of first degree burglary if the jury had been instructed on trespass.

The Serious Felony Enhancement

As noted earlier, Quamme's sentence includes a five-year enhancement for a prior serious felony under section 667, subdivision (a). Quamme and the People agree, as do we, that the matter must be remanded so the trial court can consider striking this enhancement pursuant to the discretion newly granted to the court by Senate Bill 1393.

Section 1385 empowers a trial court to "order an action to be dismissed" in furtherance of justice, on its own motion or the prosecution's motion. (§ 1385, subd. (a.).) This power has been held to include "the lesser power to strike factual allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) Prior to the effective date of Senate Bill 1393 (January 1, 2019), however, section 1385 expressly excluded prior serious felony convictions alleged "for purposes of enhancement of a sentence under Section 667." (§ 1385, subd. (b); Stats. 2018, ch. 2013, §§ 1-2.) Section 667, subdivision (a)(1), also expressly referred to this limitation. Consequently, trial courts did not have discretion to strike prior serious felony allegations made under section 667, subdivision (a). Senate Bill 1393 amended section 1385 to delete the exclusion, and amended section 667, subdivision (a), to delete the reference to the exclusion. Beginning January 1, 2019, therefore, trial courts have the discretion to strike a five-year prior serious felony enhancement allegation.

Absent evidence to the contrary, it is presumed the Legislature intended an amended statute reducing the punishment for a criminal offense to apply retroactively to defendants like Quamme whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Because there is no indication Senate Bill 1393 was intended to operate prospectively only, it applies retroactively to Quamme's case. However, nothing we have said here should be construed as expressing any opinion on how the trial court should exercise its discretion on remand.

DISPOSITION

The sentence is vacated and the case is remanded to the trial court for resentencing in light of Penal Code sections 667 and 1385 (Stats. 2018, ch. 1013, §§ 1-2), as amended by Senate Bill No. 1393 (2017-2018 Reg. Sess.). The judgment is otherwise affirmed.